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Supreme Court of the United States

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

V.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF OF APPELLANT

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Kansas City, Missouri,
November 23, 1934.

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I

OPINIONS BELOW

The opinion of the Supreme Court of Kansas in this case appears at pages 16 to 30 of the printed record and is reported in 139 Kan. 185, 29 Pac. (2d) 1104. The opinion denying motion for rehearing appears at pages 31 to 32 of the printed record and is reported in 139 Kan. 849, 33 Pac. (2d) 151.

II

JURISDICTION

Paragraph 1 of Rule 12 has been complied with and a separate statement as to jurisdiction filed. Probable jurisdiction was noted October 15, 1934. Appellee does not controvert, and we submit, that Section 237 of the Judicial Code confers jurisdiction upon this Court.

The contention that the statute of Kansas here involved (Sec. 16, Ch. 225; Laws of Kansas 1929; Sec. 68-415 R. S., 1933 Supp.) violated the Fourteenth Amendment was made and presented in the first instance by the answer of the appellant (defendant below). The lower court expressly took notice of the federal constitutional question raised and decided it against the appellant. There is, therefore, involved herein the question of the validity of a statute of the State of Kansas on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest court of the state is in favor of its validity. Clearly, therefore, this court has jurisdiction of this appeal. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23.

III

STATEMENT OF THE CASE

This is an appeal from a peremptory writ of mandamus issued by the Supreme Court of Kansas in an original proceeding brought in said court against the

appellant, Panhandle Eastern Pipe Line Company, requiring it to proceed forthwith to make and complete the changes in its pipe lines and telephone lines in accordance with the orders, plans and specifications adopted and approved by appellee, the State Highway Commission of Kansas.

The appellant is a private corporation owning and operating a high pressure pipe line system and a telephone line in and through the State of Kansas and other states used in transporting natural gas in interstate commerce. At the points involved in this proceeding its lines are located upon private property, and not upon, along or across existing highways.

The appellee is an administrative agency, created as a body corporate by legislative act, and is by statute vested with the authority and charged with the duty to lay out, open, alter, vacate, and reestablish highways in the State of Kansas.

Appellee surveyed and laid out routes for certain new highways in the state. At six places the proposed routes of such highways intersect and cross the private rights of way owned by appellant and occupied by its gas transmission line and telephone line. (R. 3, 4.)

Rights of way for the pipe and telephone lines were acquired by appellant from the landowners in 1930 and the lines were constructed and laid during 1930 and 1931. (R. 10.) These right-of-way agreements granted to appellant the perpetual right to lay, maintain, alter, repair, operate and remove pipe lines, drips, gates, telephone and telegraph lines and all appurtenances

convenient for the transportation of oil, gas or other substances. (R. 13.) Subsequent thereto appellee acquired from the landowners rights of way for the construction of new public highways over these same lands. (R. 3.) The consent or permission of appellant to occupy and use its right of way for the construction of new highways across the same has not been procured by appellee either by grant or condemnation, nor permission been obtained to make changes or alterations in said lines.

Plans and specifications for the construction of these new highways were prepared and adopted by the appellee, showing that it was necessary in carrying out the work to make certain changes and alterations in the location of appellant's pipe and telephone lines; requiring in certain instances the removal thereof to a different location, in others the lowering of the pipe lines below drainage ditch level, and in still others the encasing of the pipes at points where the proposed highways will cross them. (R. 3.)

Purporting to proceed under statutory authority (Sec. 68-415, R. S. Kansas, 1933 Supplement), the appellee, through its representatives, verbally ordered appellant to make the above enumerated changes and alterations forthwith at its own cost and expense, the fair and reasonable cost of which is estimated to be not less than $5,460.00. (R. 4.) The appellant refused to comply with such order, and thereupon the appellee filed a verified motion in the Supreme Court of Kansas for a peremptory writ of mandamus to require the appellant to comply with its said order and

to proceed forthwith to make and complete in an efficient and workmanlike manner said changes in its lines in accordance with the plans and specifications adopted by the appellee for the construction of the highways in question. (R. 2 to 6.)

Upon the filing of said motion and on January 15, 1934, the court below issued its alternative writ of mandamus against the appellant in accordance with the prayer of appellee's motion, ordering that said changes be made forthwith or that appellant show cause on or before the 25th day of January, 1934, why the same should not be done. (R. 6 to 7.)

On January 18, 1934, appellant filed its answer to said motion. (R. 8 to 14.) In the answer all questions of fact were eliminated by appropriate admissions, and the sole issue in the case was resolved into the proper construction of the statute under which the appellee purported to proceed and the constitutionality of said statute when construed as contended for by the appellee. Appellant pleaded specially as a defense to said motion that if said statute be construed and interpreted to mean that appellee may lawfully require appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe and telephone lines located upon private property, it is unconstitutional and void under the provisions of the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereto, in that such construction of said statute will operate to take appellant's property without due process of law and will deny

to it the equal protection of the laws; and will operate to interfere unreasonably with appellant's business of transporting natural gas in interstate commerce, contrary to the commerce clause of the Constitution of the United States (Section 8, Article I). (R. 11 to 12.)

To this answer the appellee filed a motion for judgment on the pleadings. (R. 15.) The case was argued orally and in briefs filed and thereafter on March 10, 1934, decision was rendered in favor of appellee, allowing the peremptory writ of mandamus. (R. 16 to 30.)

In deciding the federal constitutional question raised against appellant, the court below said:

> "The answer duly pleaded violation of rights secured to the pipe line company by provisions of the Constitution of the United States relating to taking private property without due process of law, equal protection of the laws, and interstate commerce. Whatever burden on interstate commerce adjustment of the pipe line company's use of the highways to highway uses may occasion is purely incidental to proper exercise of the state's police power. Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with respect to apportionment of cost was not unreasonable. The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law. Therefore, none of plaintiff's constitutional rights was invaded." (R. 29.)

Thereafter on June 9, 1934, the court denied appellant's motion for rehearing (R. 31 to 32); and on July 6, 1934, issued final judgment against the appellant. (R. 33 to 35.)

The appeal to this Court was allowed by the Chief Justice of the Supreme Court of Kansas on August 27, 1934, or within three months after the judgment of that court became final. (R. 41 to 42.)

IV

SPECIFICATION OF ERRORS COMMITTED

The federal constitutional question involved herein is raised in appellant's three assignments of error, but for the purpose of brevity the first assignment of error only need be set forth here as it embraces the essential points involved. This assignment of error appears at pages 35 to 36 of the printed record. For the convenience of the court, we quote it:

> "The Supreme Court of the State of Kansas erred in holding and deciding that Sec. 16, Ch. 225, Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement), whereunder the State Highway Commission of Kansas, an administrative agency, ordered and required the defendant, Panhandle Eastern Pipe Line Company, at its own cost and expense, to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon, or across any existing state highway, in order to accommodate said rights of way and easements, pipe lines and telephone lines to the plans and specifications of said

highway commission for the construction of new highways across the same is, as applied to defendant, valid and constitutional; and in holding and deciding that the said order and requirement of said state highway commission made solely under and pursuant to said statute are valid and constitutional, and impose an enforcible and constitutional legal obligation on defendant to obey said requirement; and in ordering defendant by peremptory writ of madamus to obey and perform said order and requirement; the error being that the construction and interpretation of said statute in said manner makes said statute unconstitutional and void under the provisions of the Constitution of the United States and particularly Sec. 1 of the Fourteenth Amendment to said Constitution, in that said statute when so construed and interpreted and said order of the state highway commission made thereunder are unconstitutional, null and void and operate to take said defendant's property without due process of law and deny to it the equal protection of the laws; said statute, when so construed and interpreted, by its terms undertakes to delegate to the state highway commission, an administrative agency, the arbitrary power to make, and said commission did, pursuant solely to the supposed authority of said statute, make said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary *ex parte* decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said state highway commission, an enforcible and final legal duty to comply

with such order and perform the requirements of said state highway commission; thus depriving defendant of due process of law and taking its property without due process of law; that in said suit there was expressly drawn in question the validity of said statute of the State of Kansas when so construed and interpreted on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Kansas is in favor of its validity, which decision is hereby assigned as error."

V

SUMMARY OF ARGUMENT

The contention of appellant in this cause is that the statute (Sec. 16, Ch. 225, Laws of Kansas 1929, R. S. 68-415, 1933 Supplement) and the order of the state highway commission purporting to have been made under its authority are unconstitutional and void, being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Said statute provides that:

"Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway

commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of-way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid."

Under the construction placed upon this statute by the decision in this case, the State of Kansas has unlawfully delegated to its highway commission the arbitrary and exclusive power to order and require, in an *ex parte* manner, without notice, without evidence, without hearing, without opportunity or right of review or appeal, and without any proceeding in any recognized legal form which has the slightest color of due process of law, the appellant, at its own cost and expense, to remove, relo-

cate, change and alter the location and design of its pipe and telephone lines located upon private property, and not located upon, along or across existing state highways.

Appellant contends that the said statute, as construed by the court below in this case, is unconstitutional and void; and the order and requirement of the state highway commission, an administrative agency, made pursuant thereto is arbitrary and unlawful; that said statute and order deny to appellant rights secured to it by the Constitution of the United States, and takes its property without due process of law and without just compensation and denies to it the equal protection of the laws, contrary to the provisions of said constitution.

It does not matter that the material allegations of fact in appellee's motion for writ of mandamus were admitted or that the changes in question should be made in the interests of public convenience if the highways in question are constructed. The question which we urge is that the statute on its face, and, as authoritatively construed by the highest court of the state, unlawfully delegates to an administrative agency the power to take appellant's property without compensation, without due process of law, and denies to it the equal protection of the laws.

The challenged statute and the order of the highway commission made in this case are substantially the same as the statute of Virginia and order of its highway commission which were held to be unconstitutional and void in the recent case of *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190. In fact the Kansas statute is more objectionable than the Virginia statute, because the latter, as construed

by the Supreme Court of Virginia, did provide opportunity for review in the event the power is perverted or abused. Under the construction placed on the Kansas statute by the court below, the order of the commission made in a "star chamber" proceeding, without notice, without evidence, without hearing, in the absence of the appellant, and without following any procedure having the slightest color of due process of law, is valid and enforcible and is being enforced by a peremptory writ of mandate.

In upholding the statute and the order of the highway commission, the Court below relied principally upon the decision of this Court in *Erie R. R. Co.* v. *Public Util. Com.*, 254 U. S. 394. That case did not involve the question here presented. There the statute itself afforded every opportunity for notice, hearing, appeal and review on the merits. The requirement that the railroad stand a portion of the expense of eliminating a grade crossing was imposed only after notice and a great many hearings over a period of about two years, followed by a full review on the merits. The Erie and other railroad crossing cases are not analogous to the instant case, and are clearly distinguishable. The question of public safety is not involved in the case of pipe lines as it is in unprotected grade crossings over railroads.

The distinction is pointed out in *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 594, where this Court quoted with approval the following statement from an opinion of the Supreme Court of Minnesota:

"The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the Constitution from being divested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public."

It will not be contended by the appellee that its order and requirement does not operate to take appellant's property. The question is, can the highway commission take this property from the appellant without compensation? The statute does not provide for notice, hearing, evidence, or appeal by the property owner. We think it clear that the state is without power to take private property for a public use in such manner.

Appellant further contends that the statute, as construed, denies to it the equal protection of the laws. The act, of which Section 16 herein involved is a part, also provides for the elimination of dangerous railroad grade crossings. Section 15 thereof (R. S. 68-414, 1933 Supplement) provides in part, that:

"That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings where the lines of said railroad companies intersect state highways, when in the judgment of the state highway commission such viaducts,

tunnels, underpasses, bridges or grade crossings are necessary for the proper construction of the state highway system, for the safety of the general public, or for the elimination of a dangerous grade crossing: Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance of viaducts, tunnels, underpasses or bridges. * * *"

Before the commission may order and require railroad companies to construct viaducts, underpasses, etc., there must be present three necessary elements, to-wit: The necessity for the proper construction of the highway system; for the safety of the general public; or in the elimination of dangerous grade crossings.

With respect to railroads, the act provides for the division of the expense, between the railroad companies and the state highway commission in an equitable proportion; on the other hand, in the case of transmission lines, absolute, exclusive and arbitrary power is conferred upon the highway commission without the necessity of there being present any of the conditions above enumerated, and without any provision for the division of cost incurred.

Separate classification of transmission lines from railroads, requiring the former to bear the entire cost of changes made while the railroad companies are entitled to be reimbursed for a good part of their expense, is arbitrary, discriminatory and unreasonable, and such classification denies to the appellant the equal protection of the laws.

VI

ARGUMENT

The several assignments of error are embraced in the following point upon which appellant relies in this Court:

> "The order of the State Highway Commission of Kansas, an administrative agency, requiring appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon private property, and not located along, upon or across existing state highways, in order to conform the same to the plans and specifications of said commission for the construction of new highways, which said order was made without prior notice, without a hearing, without evidence, and without an opportunity for appeal and general review, and Sec. 16, Ch. 225 of the Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement) construed by the Supreme Court of Kansas herein as giving said commission the arbitrary power to make such order, and under the authority of which the commission's order was purported to have been made, operate to take appellant's private property without due process of law and without just compensation and deny to it the equal protection of the laws, in violation of the Fifth Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and that said order and said statute are therefore unconstitutional and void." (R. 44.)

(A) The Statute of Kansas, the Validity and Constitutionality of Which Is Challenged

The order of the appellee upon which this suit is based was made under the purported authority of Sec. 16, Ch. 225, Laws of Kansas 1929, above quoted.

The statute makes no provision for any hearing with respect to the convenience and necessity for the construction of new highways and the removal of pipe lines and telephone lines from lands to be occupied thereby; no provision for the taking of any evidence with respect thereto; no provision for notice to the parties affected; no provision for following any established legal procedure; no provision which would give a pipe line company an opportunity for a review of the reasonableness of the highway commission's order; no opportunity for appeal; and no provision for compensation to any extent. The statute as construed undertakes to give the highway commission absolute and arbitrary power as a forum of last resort to make this requirement, with or without assigned cause, based merely upon its administrative fiat, whim or caprice. We believe the appellee will concede that, as construed by the court below, the statute makes the commission's *ex parte* order and requirement absolute and final. The result of such order made in the manner aforesaid is the taking of appellant's property without any compensation and without due process of law.

(B) The Procedure Followed by the State Highway Commission

The appellee prepared its plans and specifications for the location and construction of certain new highways in the State of Kansas. The proposed routes of such highways cross the private rights of way of the appellant in several places. These plans and specifications showed that certain changes and alterations in appellant's pipe lines and telephone lines were necessary if appellee carried

out its purpose. Thereupon appellee delivered a copy of its plans and specifications to appellant with notice to conform its established lines thereto forthwith and at its own expense.

In adopting said plans and specifications and in making its order, appellee made no pretense of following any recognized form of legal procedure. No notice was given, no hearing held, no opportunity given appellant to be present or represented, no evidence taken or opportunity given to introduce evidence.

(C) The Constitutional Question

The constitutional question to be determined may be stated as follows: Is a state statute valid as against the charge that it violates the due process and equal protection clauses of the Fourteenth Amendment and takes private property without compensation, where such statute, as construed by the highest court of the state, delegates to the highway commission an administrative agency, the power, without notice to the parties affected, without a hearing, without following any form of legal procedure having any color of due process of law, and without giving the parties affected any right or opportunity for review, to determine arbitrarily in an *ex parte* manner and to order and require the company, at its own expense, to remove, relocate, change and alter the location and design of its established pipe lines and telephone lines located upon private property, and not located along, upon or across any existing state highway or other public property, in order to conform the location, design and construction of such lines to the plans and specifications

of the highway commission for the construction of new highways across the same, and to make such order final and conclusive, and to impose in said manner a final legal duty upon the company to obey the same?

The court below answered this question in the affirmative, and held that the statute does not authorize and the order of the commission does not involve a taking of property without due process of law. It is not clear from the opinion as to the reasoning upon which this conclusion is based, except that the taking is claimed to be justified under the police power.

(D) The Order of the Commission Involves a Taking of Property

It seems obvious that an order under which appellant is required to expend a minimum amount of $5,460.00 in making changes and alterations in its structures in order to conform the same to the plans of the highway commission for the construction of new highways does constitute a *taking* of private property. Except for the order and requirement of the commission, these changes and alterations need not be made. The lines are newly constructed, constitute a part of an established pipe line system and are improvements of a permanent nature. The outlay of this amount of money to make these changes and alterations in these newly built lines certainly takes appellant's property in a very real sense. This is as true in the case of a pipe line and telephone line as it is in the case of constructing overhead grade crossings and underpasses on railroads, which it is uniformly held constitutes a taking of prop-

erty. For example, in *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, decided December 4, 1933, this Court said (page 194):

> "Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority."

In *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, this Court, speaking through Mr. Justice Lamar, said (page 523):

> "The commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid."

Great Northern R. Co. v. *Minnesota,* 238 U. S. 340, involved an order of a railroad commission directing a railroad company to erect a 6-ton scale in its stockyards. This Court, speaking through Mr. Justice McReynolds, said (page 345):

> "Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances."

We think appellee's counsel will concede, as indeed they must, both upon reason and authority, that the enforcement of the commission's order does involve a taking of appellant's property. In the court below it was apparently conceded that a taking of private prop-

erty was involved, but the taking was sought to be justified under the police power of the state. The question, therefore, is whether in the taking of its property due process of law was afforded to appellant, and if not, whether a taking is justified under the police power.

(E) The Statute Does Not Afford the Parties Affected Due Process of Law and the Order of the Commission Was Made Without Due Process of Law, and Unlawfully Takes Appellant's Property for Public Use Without Compensation

The statute, as construed by the court below, purports to authorize the taking of private property for a public use without compensation. The lower court held that the statute applies not only to pipe and telephone lines actually located upon the rights of way of public highways, but also to those located upon private property. Under this decision, whenever the commission lays out a route across the country for the construction of a new highway and such proposed route intersects or crosses established pipe lines or telephone lines upon private property, it may summarily order the removal thereof or require costly changes and alterations therein at the owner's expense. And this it may order without prior notice, without a hearing, without taking evidence, and without the right of review by the party affected. Nothing need be done by the highway commission except "require the removal" to such other location on the right of way as it may designate. The commission's order that these things be done may be without assigned cause or reason and

its decision is final. No method is provided whereby the reasonableness of its order may be inquired into. The highway commission is the forum of last resort. No edict of a dictator could be more absolute and final.

The correct answer to the question here is not dependent upon the fact that it was necessary in the interests of public convenience (a) to lay out and construct the new highways in question; (b) that such highways be constructed at the particular points designated; (c) that the changes and alterations in the pipe lines and structures of appellant must be made if the highways are constructed. The test to be applied is whether or not the statute under which the appellee proceeded in this case, as construed, afforded appellant the rights guaranteed to it under the Constitution. Do the provisions of the Fourteenth Amendment permit the taking of appellant's property in the manner set forth in the statute as construed by the court below? A person may be deprived of his property by the state, but only after he has been afforded due process of law and just compensation has been made.

A fundamental requirement of due process of law is that the party whose property is to be taken or whose rights are to be affected must have prior notice thereof and a hearing or opportunity to be heard must be given.

In *Riverside & D. R. Cotton Mills* v. *Menefee*, 237 U. S. 189, 193, this Court, through Mr. Chief Justice White, said:

> "That to condemn without a hearing is repugnant to the due process clause of the fourteenth amendment needs nothing but statement."

In the oft-quoted case of *Stuart* v. *Palmer*, 74 N. Y. 183, 191, it was said:

> "A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

In *Turner* v. *Wade*, 254 U. S. 64, this Court held a Georgia statute unconstitutional under the due process clause of the Fourteenth Amendment where the county board of assessors, conformably with the statute, increased the valuation of property as returned for taxation without notice or hearing. In the opinion (page 67) it was said: "* * * due process of law requires that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of a tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings."

In *La Plata River & Cherry Creek Ditch Co.* v. *Hinderlider*, (Colo. 1933), 25 P. (2d) 187, 188, the Supreme Court of Colorado said:

> "Due process always implies a hearing, or trial, and judgment. * * * If private rights may be stripped from the citizen by state 'compacts,' by legislative fiat, by commissioners, by the uncontrolled discretion of state engineers, then 'due process' is dead in Colorado."

This principle of law is so well settled that citation of authority seems unnecessary for, as Chief Justice White said in the *Riverside Case, supra*, it "needs nothing but statement."

Nor would it matter that had due process of law been afforded in this case the result might have been the same, for the fact that appellant might not have had a defense upon the merits is not the determining factor. The vice in this statute and order is that due process of law is not provided for or afforded to those whose rights are affected.

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, it was contended that a Florida statute was not invalid because of failure to provide for notice, hearing, or opportunity to be heard since the result would have been the same. This contention was overruled, and in commenting thereon it was said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

In that case this Court quoted with approval from *Stuart* v. *Palmer*, 74 N. Y. 183, as follows:

> "It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard."

In the early case of *Rees* v. *Watertown*, 19 Wall. 107, this Court said:

> "The proceeding supposed would violate that fundamental principle contained in Chapter 29 of Magna Charta and embodied in the Constitution of the United States, that no man shall be deprived

of his property without due process of law—that is, he must be served with notice of the proceeding and have a day in court to make his defense. *Westervelt* v. *Gregg*, 12 N. Y. 209.

'Due process of law (it is said) undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' • • • Whether in fact the individual has a defense to the debt or by way of exemption, or is without defense, is not important. To assume that he has none and therefore that he is entitled to no day in court is to assume against him the very point he may wish to contest."

The doctrine of *Rees* v. *Watertown*, *Stuart* v. *Palmer*, and *Coe* v. *Armour*, *supra*, has been consistently followed.

In *Investors' Syndicate* v. *Porter*, 52 Fed. (2d) 189, 192, it was said:

"According to the weight of authority, although the owner may have been given notice and even a hearing, indicating a desire for fair play on the part of the officer, that is not sufficient to satisfy the constitutional requirement, unless the right to such notice and hearing is embodied in the statute."

In *Wuchter* v. *Pizzutti*, 276 U. S. 13, a New Jersey statute which failed to provide notice to defendant was held unconstitutional under the due process clause. In the opinion (page 24) it was said:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the stat-

ute. Not having been directed by the statute, it cannot, therefore, supply constitutional validity to the statute or to service under it."

Proceedings, although authorized pursuant to the police power, must conform to the requirements of due process which necessitates notice to the person affected, together with a hearing and findings based upon evidence.

In the case of *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, 44-45, this Court, speaking through Mr. Justice Brandeis, said:

> "An order based upon a finding made without evidence (*The Chicago Junction Case*, 264 U. S. 258, 263), or upon a finding made upon evidence which clearly does not support it, (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

The well-established principles of law for which we contend in this case were applied in the quite recent case of *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, wherein it was held:

> "A state statute which, as authoritatively interpreted, permits the state highway commissioner, without notice or hearing, to command a railway company to abolish any designated grade crossing and construct an overhead, when in his opinion necessary for public safety and convenience, and which makes his opinion final upon the question of public convenience and necessity unless what the Supreme Court of the state denominates 'arbitrary' exercise of the power can be shown, in which case relief might be had in equity, conflicts with the

due process provision of the fourteenth amendment against taking property without due process of law." (Syllabus)

The Southern Railway case is decisive of the case at bar.

If we assume *arguendo* that a state may require under given circumstances that pipe lines laid upon private property subsequently crossed by the route of a proposed highway be removed in the interests of public safety, the question still arises whether the statute under which the appellee proceeded meets the requirements of due process of law. The statute attempts to give an administrative board the power to make final determination as to whether the lines should be changed, removed, altered, etc., without notice, without a hearing and without evidence. The statute provides no method of review by any court. As stated by Mr. Justice McReynolds in the *Southern Railway Company Case, supra* (page 195), "The thing so authorized is no mere police regulation."

In its opinion the court below refers to the allegations in paragraph 5 of appellee's motion that it is necessary and in the interest of public safety that at the points of intersection the lines of appellant be changed, lowered, encased or moved.

It will be noted that appellee's motion does not allege, and appellant's answer does not admit, that these transmission lines constitute hazardous or dangerous instrumentalities to the traveling public. The lines as now installed are perfectly harmless and are not dan-

gerous in any sense. Except for the new highway plans of the appellee, no changes therein are necessary.

The railroad crossing cases cited and relied upon by the court below are without application. These cases are grounded on the proposition of imminent danger to the traveling public. Because of this great hazard and the well-known fact that many serious accidents occur at railroad grade crossings, the courts have held that in the exercise of the police power states may require railroad companies to eliminate these dangerous crossings. In many of such cases the railroad companies are required to bear a portion of the expenditure involved. Undoubtedly this is due to the fact that the railroads are benefiting by the change, since the structure replacing the grade crossing is a valuable asset to the company by reducing the possibility of liability for crossing accidents. It also becomes the property of the company and is included in a valuation for rate making purposes. Here the pipe line is obtaining no benefit whatsoever.

In *Re Elimination of Highway-Railroad Crossing*, 264 N. Y. 195, 202, 190 N. E. 344, 348, the Court of Appeals of New York said:

> "Referring again to the Grade Crossing Act, Sec. 3, Par. 2, we find how the cost is to be apportioned *after* the work is completed. • • •
>
> This act prescribes, as it says, a full and complete scheme for removing the danger at grade crossing. • • • It is all one purpose and one improvement, called an elimination proceeding, the cost of which is to be shared by the state, municipalities, and railroad as in the act provided."

The danger to the traveling public is the basis upon which these railroad grade crossing elimination cases rest. In *Erie R. R. Co.* v. *Public Util. Commrs.*, 254 U. S. 394, 412, this Court, speaking through Mr. Justice Holmes, said:

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone, we well might hesitate. But the situation is one that always is dangerous."

In the case at bar the element of danger is not present. True, it was alleged in the motion that it was necessary and in the interests of public safety that the highways be constructed, and therefore necessary and in the interests of public safety and convenience that the changes in the lines be made. But it was never contended that these lines as now constructed constitute a dangerous agency or that the safety of the traveling public is endangered by the manner of their construction.

Pipe lines are not in the same category as railroads. It is common knowledge that many thousands of miles of oil, gas, and gasoline pipe lines, telephone and telegraph lines, water lines, etc., have been constructed and are in operation throughout the country; that these lines intersect, cross, and are laid upon the rights of way of public highways in many places. When properly constructed, such lines are never considered

dangerous. It is only because in this particular instance the proposed highways encounter these existing lines that the necessity for changes and alterations therein arises.

We have diligently searched and have been unable to find a single case where transmission lines of this type have been found to be dangerous in the sense that the state may declare them to be a nuisance and order their summary abatement under the police power as is done in the elimination of dangerous grade crossings. Pipe lines and telephone lines cannot reasonably be placed on the same footing with railroads as regards the subject matter of this action so that the state may require these changes to be made at appellant's sole cost.

Appellant has never contended, and does not now contend, that it may not be required, in a proper proceeding, to make changes and alterations in its transmission lines in order to enable the appellee to lay out, construct, and maintain its proposed new highways. But it does insist that it is entitled to reimbursement for the expense necessarily incurred in so doing.

The statute, of which Section 16 is a part, clearly contemplates that compensation shall be paid whenever any lands or interests or rights therein are taken for highway purposes. Section 14 thereof provides, in part:

> "That the state highway commission, in the name of the state, may acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain, to any lands or interest or rights therein, * * *. The right of eminent

> domain when exercised as herein provided shall be in accordance with the provisions of Article 1, Chapter 26 of the Revised Statutes of 1923, and in addition to the notice required therein all lienholders of record of the condemned land must also be notified."

The contention which appellant here makes is nothing more than what rational justice, equity and fairness requires. There is nothing in this case which requires the highway commission to exercise emergency and extraordinary measures. The commission might well have proceeded in the same manner as it does when acquiring other necessary rights and property in the construction of new highways, namely, to acquire them in the manner contemplated by the above-quoted statute—by purchase or the exercise of the right of eminent domain. There is little doubt that had the highway commission proceeded by way of condemnation, appellant would have been entitled to recover compensation. It was so held by the court below in a very similar situation. In *Cities Service Gas Co.* v. *Riverside Drainage District*, 137 Kan. 410, 20 Pac. (2d) 520 (decided April 8, 1933), it was said:

> "We conclude that the plaintiff was entitled to recover not only the value of the land actually taken, but the reasonable expense of the relocation of the pipe line made necessary by the improvement of the watercourse on the plans of the drainage district."

The contention that a state may not, under the guise of the police power, take private property for a public use without paying compensation is fully supported by

the following statement of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, 416:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch* v. *Boston*, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Our government has always stood as firm as the Rock of Gibraltar in the protection of private property. In *Lynch* v. *United States*, 292 U. S. 571, 579, Mr. Justice Brandeis observed:

> "The fifth amendment commands that property be not taken without making just compensation."

And in *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 689, this Court said:

> "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation."

We think the following statement of Judge Hutcheson in the recent case of *Hulen* v. *City of Corsicana*, 65 Fed. (2d) 969, 971, 972, Circuit Court of Appeals, Fifth Circuit, is sharply applicable here:

> "Appellant urges that to say in the face of a constitution like ours, providing 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made' (Article 1, Section 17), a municipal corporation can saddle onto a railroad company a part of the necessary cost of establishing a waterworks system, to be operated for the private profit of itself and its inhabitants, is to run into the ground both the doctrine of public interest and police power, in order 'in the interest of the city's necessities' to shift its burden onto the shoulders of the railroad company. * * *
>
> We agree with appellant. No reason suggests itself to us why a railroad company should be compelled to contribute to the cost of constructing municipal waterworks which the city built and is profitably conducting as a proprietary enterprise. The facts as found establish that the expenses imposed upon the railroad company were incurred entirely in the interests of the city and its inhabitants. If the property which the city flooded had been owned by a private citizen or corporation, no one would question that it could not be made to contribute to

the city by assuming the burden here imposed. We think it goes without saying that neither may the railroad company be made to contribute to the project."

(F) The Statute and the Order of the Commission Deny to Appellant the Equal Protection of the Laws

In sustaining the order of the highway commission, the court below held that:

> "Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with respect to apportionment of cost, was not unreasonable."

Comparison of the provisions of Sections 15 and 16 of the statute in question discloses the following differences in requirements between *transmission lines* and *railroads*:

Section 15, which deals with the elimination of grade crossings on railroads, provides that the highway commission's power and authority to compel railroad companies to construct, etc., viaducts, etc., is dependent upon: (a) necessity for the proper construction of the state highway system; (b) the safety of the general public or the elimination of a dangerous grade crossing. Provision is made for the division of the expense between the railroad companies and the state "in a fair and equitable proportion."

Like provisions are not contained in Section 16 of the act, which deals with removals of transmission

lines "now upon state highways." It is apparent that transmission lines have been singled out and arbitrary power conferred upon the highway commission to require costly changes in existing structures (which may be more expensive than railroad viaducts, underpasses, etc.) without the necessity of there being existent any of the elements which must be present in the case of railroads. Nor is provision made for the division of the expense between the highway commission and the transmission companies, as is done in the case of railroads.

If, as the court below said, "Transmission lines of all kinds * * * are on the same footing with railroads with respect to grade crossings," then why are transmission lines classified separately and a burden imposed upon them which is not imposed upon railroads? Why must the highway commission give consideration to the several factors above enumerated when dealing with railroads and not in the case of transmission lines? Why must it bear a fair and equitable proportion of the expense in the one case and not in the other? Why may it require costly changes, alterations and removals in transmission lines without assigned cause or reason, while in the case of railroads the element of danger to the public must be present? Is it reasonable to require payment of compensation to the one and not to the other? In the final analysis, are railroads so different from pipe lines that separate classification is justified?

We submit that this Court knows judicially that railroads, in operating their fast-moving trains across highways, are inherently more dangerous and constitute more

of a hazard to life and property than do stationary transmission lines. We contend that a classification which favors railroads as against transmission lines is arbitrary, discriminatory and unreasonable, and denies to the latter the equal protection of the laws.

While reasonable classification may be made without doing violence to the equal protection clause of the fourteenth amendment, if a classification is made, it must rest upon some fundamental difference which bears a reasonable and just relation to the thing in respect to which the classification is made. As it has been often held, "arbitrary selection can never be justified by calling it classification." There is no fundamental difference between requiring a railroad to construct an underpass at a grade crossing and requiring a transmission company to encase its pipe lines laid under the highway.

The subject of legislative classification was fully considered and discussed by this Court in the leading case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. We quote the following pertinent excerpt from the opinion (page 558):

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state,

> even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In that case this Court quoted with approval the following from *Barbier* v. *Connolly*, 113 U. S. 27, 31:

> "The fourteenth amendment * * * undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, * * *."

In *Quaker City Cab Co.* v. *Commonwealth of Pa.*, 277 U. S. 389, 400, this Court held unconstitutional and void a statute which imposed a tax on *corporations* engaged in the business of transporting passengers or freight while *individuals* engaged in the same business were not taxed, and said that while the equal protection clause does not detract from the right of the state justly to assert its taxing power or prevent it from adjusting its legislation to differences in situation, or forbid classification in that connection, "but it does require that classification be not arbitrary, but based on a real and sub-

stantial difference having a reasonable relation to the subject of the particular legislation."

It is submitted that the classification made in this case between railroads and transmission lines does not rest upon any difference which bears a reasonable and just relation to the thing in respect to which the classification is made, and that the imposition of heavy burdens upon transmission companies not imposed upon railroads under like circumstances and conditions amounts to arbitrary selection and is not proper classification.

(G) The Statute, As Construed, Cannot Be Upheld As a Valid Exercise of the Police Power

The court below upheld the challenged statute upon the theory that it conferred upon the highway commission the right to exercise the police power of the state to make public travel on the highways safe. While a number of decisions are cited in support of its holding, in none of them was the power exercised in such summary manner and without affording due process of law as was done in this case.

While we recognize that under some circumstances private property may be taken or destroyed in the interests of the common good by summary proceedings without notice, hearing or compensation, we submit that instances where this may be done are strictly limited and are the exception. They usually involve emergencies, dire necessity, imminent danger or the property taken or destroyed is of such little value that the cost of condemnation would exceed it. Private property may not be taken or destroyed under the guise of the police power. There

must be grave reasons and urgent necessity which will not permit following customary legal proceedings.

Illustrative of the circumstances under which property may be taken or destroyed in summary proceedings is the case of *Lawton* v. *Steele*, 152 U. S. 133, wherein this Court said (page 140):

> "But where the property is of little value and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagration; destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes."

Also *Cities Service Gas Co.* v. *Riverside Drainage District*, 137 Kan. 410, 20 Pac. (2d) 520, in which the court below said:

> "Defendant seeks to justify the instruction given by the court on the theory that the taking and appropriation was an exercise of the police power of the state and that the plaintiff holds its property, which is charged with a public interest, subject to an exercise of the police power and that in such cases private rights may be invaded without compensation. The rule applies in some emergencies, such as the destruction of property to avert impending peril, as to prevent the spreading of fire, the washing out of a highway during a freshet or flood and the abatement of a nuisance. • • • Property cannot be appropriated without compensation under the guise of the police power. If the requirements are unreasonable and arbitrary and operate to deprive an owner of his property within the par-

view of the law of eminent domain, they will not be upheld."

Every state power, including the police power, is limited by the inhibitions of the Fourteenth Amendment against the taking of property without due process of law.

In the case of *Southern Ry. Co.* v. *Virginia, supra,* it was contended that the statute was enacted under the police power of the state and hence not subject to the standards applicable to legislation under other powers. This contention was dismissed by this Court which held that such claim "conflicts with the firmly established rule that every state power is limited by the inhibitions of the fourteenth amendment."

In the language of Mr. Justice Butler in *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 508:

> "The state may not by any of its agencies disregard the prohibitions of the fourteenth amendment."

The legislature in this instance has not found or declared that pipe lines or telephone lines, even on existing highways, are dangerous or that the maintenance thereof makes the highways unsafe and that public welfare demands their removal, much less the maintenance of such lines on private property subsequently crossed by highways newly laid out. The act does not require that such lines as are located on the highways must be removed therefrom, or that such lines constitute a nuisance which should be abated; but merely provides

that the commission may require their removal to such other location on the highway as it may designate. The act is completely silent as to pipe lines and telephone lines located on private property which in the future may be intersected by new highways.

Instances of the exercise of the police power of a state include the power to impose assessments for benefits, to regulate common carriers and public utilities, to establish drainage districts, and to regulate business. Whenever any of these powers of the state are exercised due process of law must be provided and afforded to the party affected thereby. Broad as is the taxing power, a state cannot delegate to an administrative board or officer the power to make a final assessment without notice or hearing and without right to contest the assessment by the parties affected. The statute itself must require notice and hearing and it is insufficient that notice or a hearing be granted as a matter of favor. *Security Trust & S. V. Co.* v. *Lexington*, 203 U. S. 323; *Central of Georgia Railroad Co.* v. *Wright*, 207 U. S. 127; *L. & N. Railroad Co.* v. *Central Stockyards Co.*, 212 U. S. 132.

In the regulation of public utilities as to rates and service, the states act under the police power. In such cases the power of the state is subject to the inhibitions of the Fourteenth Amendment. If a rate or charge fixed by legislative action, whether by the legislature itself or by its constituted agency, amounts to a taking of property without due process of law, the legislation or orders will be set aside. If rates or charges are fixed without

notice or hearing, the action is a denial of due process of law.

For example, in the case of *Chicago, M. & St. P. Railroad Co.* v. *Minnesota,* 134 U. S. 418, this Court passed upon and declared unconstitutional a Minnesota statute which gave the railroad commission of the state the power to fix rates to be charged by the railroad company or to "find that any schedule of charges filed with it by a railroad company is in any respect unequal or unreasonable" and then compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable." In the opinion it was said (page 457):

> "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The case of *Wichita Railroad & L. Co.* v. *Public Utilities Commission,* 260 U. S. 48, further illustrates the limitations upon the power of a state in delegating legislative powers or police powers to an administrative agency. This Court, speaking through Mr. Chief Justice Taft, said (page 59):

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in

> the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action."

The police power of the states, with respect to interstate commerce, was delegated to the federal government in the Constitution of the United States. The police power of the federal government, under the commerce clause, is limited by the provisions of the fifth amendment the same as are the reserved powers of the states under the Fourteenth Amendment. This Court has uniformly held that under the limitations of the Fifth Amendment congress is without power to authorize the Interstate Commerce Commission to regulate or fix rates without notice, without hearing and without sufficient evidence.

In *Interstate Commerce Commission* v. *L. & N. Railroad Co.*, 227 U. S. 88, in discussing this subject in connection with an order of the commission reducing rates, it was said (page 91):

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes un-

der the Constitution's condemnation of all arbitrary exercise of power."

While it is true that the state has broad police power to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its total wealth and prosperity, whenever such powers are exercised, except in grave emergency and dire public necessity, it must afford the persons affected due process of law and pay just compensation before their property is taken or destroyed.

The rule contended for, we feel, is sufficiently established by the cases already referred to, but attention is invited to the following decisions which further illustrate the limitations imposed by the Fourteenth Amendment in the delegation to administrative agencies of the right to act under the police power of the state in the taking or destruction of private property.

Yick Wo v. *Hopkins,* 118 U. S. 356.
Parsons v. *District of Columbia,* 170 U. S. 45.
Tracy v. *Ginsberg,* 205 U. S. 170.
Eubank v. *Richmond,* 226 U. S. 137.
Wagner v. *Leser,* 239 U. S. 207.
Embree v. *K. C. & L. B. District,* 240 U. S. 242.
United States v. *Cohen Gro. Co.,* 255 U. S. 81.
Truex v. *Corrigan,* 257 U. S. 312.
Adkins v. *Children's Hospital,* 261 U. S. 525.

In this case the Legislature of Kansas has not declared or indicated any necessity for summary pro-

ceedings in the taking of property. There is no emergency and no imminent danger to be averted by such procedure as followed by the highway commission.

VII

CONCLUSION

It is submitted that the challenged statute, as construed by the court below, unconstitutionally delegates to the highway commission the arbitrary power to take private property without notice or hearing, without evidence, without opportunity or right of appeal or review, and without following any procedure having the slightest color of due process of law, and without compensation; that the separate classification of railroads and transmission lines by which the former may be compelled to make changes in their structures only when it is found necessary for the proper construction of the state highway system, the safety of the general public, or the elimination of dangerous grade crossings, and then only upon condition that the commission bear a fair and equitable proportion of the expense involved, while in the case of transmission lines none of these factors are considered and no compensation provided, is an unreasonable classification and amounts to arbitrary selection, which operates to deny to transmission companies the equal protection of the laws; that as so construed said statute is repugnant to the letter

and spirit of the due process and equal protection clauses of the Fourteenth Amendment; and that said statute and order made thereunder are unconstitutional and void. The judgment of the court below should be reversed.

Respectfully submitted,

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Kansas City, Missouri,
November 23, 1934.